

No. 13006.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF RALPH R. HUESMAN, Deceased, NURMA W.
HUESMAN, FRED B. HUESMAN and THE FARMERS &
MERCHANTS NATIONAL BANK OF LOS ANGELES, Execu-
tors,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' OPENING BRIEF.

THOMAS R. DEMPSEY,
WELLMAN P. THAYER,
ARTHUR H. DEIBERT,
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COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

By registered letter mailed pursuant to Section 272 of the Internal Revenue Code (26 U. S. C. 272) on August 3, 1948, the Commissioner of Internal Revenue notified appellants of his determination of a deficiency of Federal Income Taxes for the fiscal year ended April 30, 1945, of \$57,923.50. [R. 31.] Thereafter on September 2, 1948, appellants filed with The Tax Court of the United States their petition appealing from the Commissioner's determination and said Court properly assumed jurisdiction over said appeal pursuant to Section 1101 of the Internal Revenue Code (26 U. S. C. 1101.) [R. 5.] On June 7, 1950, upon motion duly made and granted appellants filed their amended petition with said Court al-

leging in addition to those things alleged in the original petition, only that appellants had prior to the filing of said amended petition paid to the Collector of Internal Revenue for the Sixth Collection District of California the deficiency determined by the Commissioner as aforesaid. [R. 12.] On or about September 23, 1948, the Commissioner filed his answer to appellants' original petition. [R. 11.] He filed no answer to appellants' amended petition. Thereafter on March 20, 1950, a hearing was had before The Tax Court which entered its decision on March 30, 1951, in favor of the Commissioner. [R. 140.]

On June 4, 1951, and within the time required by Section 1142 of the Internal Revenue Code (26 U. S. C. 1142), appellants filed with the clerk of The Tax Court their petition for review and served a copy and notice thereof on the Commissioner pursuant to Rule 30 of this Court. [R. 141.] Jurisdiction of this Court to review the decision of The Tax Court in this case therefore exists by virtue of Section 1141 of the Internal Revenue Code (26 U. S. C. 1141).

Statement of the Case.

On May 3, 1944, Ralph R. Huesman died testate, a resident of the State of California. At the time of his death he was President of Desmond's, a California corporation, which was conducting a retail merchandising business in Southern California. There was due and owing to him from said corporation at the time of his death the sum of \$80,517.00 as compensation for services rendered as President of Desmond's up to the date of his death. [R. 32.]

By order of the Superior Court of Los Angeles County entered June 14, 1944, decedent's Last Will and Testa-

ment was admitted to probate. The net value of the estate exceeded \$250,000.00, a fact important in determining the applicable provisions of the Will. [R. 54.] After making certain recitations and bequests, the will provided in applicable part as follows:

“I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of every kind and nature and wherever situated, which I may own at the time of my death, and all other property over which I may have any power of disposition (all of said property being hereinafter referred to as the ‘Trusted Property’), to the Trustees hereinafter named, to have and to hold upon the following trusts and conditions [R. 41]:

* * * * *

“If my wife shall elect to take under the terms of this Will, and in the event that the net value of my estate is Two Hundred and Fifty Thousand Dollars (\$250,000.00) or more, then the provisions with reference to the Trusted Property shall be as follows:

* * * * *

“The Trustees shall pay and distribute a sum of money equal to ten per cent (10%) of the Trusted Property as follows: To my friend Dr. Henry M. Rooney, and if he be deceased to his wife, Mrs. May Rooney, the sum of Two Thousand Dollars (\$2,000.00); to my loyal secretary and employee Leonora Zinner, the sum of Two Thousand Dollars (\$2,000.00); and to Mrs. Gregory Haran, my former secretary who rendered very loyal service to me, the sum of Two Thousand Dollars (\$2,000.00); which said respective sums shall be distributed as soon as reasonably possible, and the balance of said

sum of money shall be paid and distributed by the Trustees to the following named organizations and in the proportions as follows: To Loyola University of Los Angeles, Regents' Fund, five-tenths (5/10ths);
* * *."

At all times herein material Loyola University was included in the cumulative list of organizations, contributions to which were ruled by the Commissioner of Internal Revenue deductible under Sections 23(o) and 23(q) of the Internal Revenue Code. The Regents' Fund is the building fund of said University and is used solely for the University in its building expansion program. Said fund is administered by the President of the University and checks drawn thereon are signed by him or by the Treasurer. [R. 33.]

On or about April 10, 1945, the executors of the Estate of Ralph R. Huesman, Deceased, in that capacity and in their capacity as testamentary trustees, petitioned the Superior Court for the State of California in and for the County of Los Angeles, as the Court exercising probate jurisdiction of said Estate, for instructions. [R. 82.] Concurrently therewith said executors filed a Petition for an Order of Partial Distribution. [R. 91.]

On April 30, 1945, after a hearing on said petitions, said Court entered its order and decree of partial distribution. [R. 103.] Among other things it found "that among the assets of said estate and constituting a part of the corpus thereof, is an item of compensation due the decedent in the form of a bonus from Desmond's, a corpora-

tion, in the sum of \$80,517.00, and the Court went on to direct as follows:

“It is therefore ordered and decreed that Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Executors of the Estate of Ralph R. Huesman, deceased, upon receiving said certain sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) from Desmond’s, a corporation, specifically as compensation due to the decedent in the form of a bonus at the time of his death, shall deliver said specific sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased; and said Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as said Trustees under the Will of Ralph R. Huesman, Deceased, shall distribute said specific sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) to Loyola University of Los Angeles, Regents’ Fund, in partial satisfaction of its bequest under the Will of said Ralph R. Huesman, Deceased; and that no bond shall be required by reason of any distribution order herein made.”

Concurrently therewith the Superior Court entered its Order Instructing Testamentary Trustees to Make Partial Distribution. The portion thereof material to the issue here involved is as follows:

“That under an order and decree of partial distribution granted by this Court on this day, the Executors, upon receiving said sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) from

Desmond's, a corporation, specifically as compensation due the decedent in the form of a bonus at the time of his death, shall deliver said specific sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased; that said sum constitutes the sole estate of said testamentary trust; that there are no liabilities to any creditors under said trust; that the said legacy or share of the trust estate set forth above may be distributed to Loyola University, Regents' Fund, as the institution entitled thereto, without loss to the creditors or injury to the trust estate, or any person interested therein; and that it is unnecessary that the legatee give bond;

It is therefore ordered and decreed that the said sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) received by Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Executors of the Estate of Ralph R. Huesman, Deceased, from Desmond's, a corporation, specifically as compensation due to the decedent in the form of a bonus at the time of his death, and delivered under order of this Court, as a specific sum to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased, shall be delivered as a specific sum to Loyola University of Los Angeles, Regents' Fund, in partial satisfaction of its bequest under the Will of Ralph R. Huesman, Deceased; and that no bond shall be required by reason of any distribution granted hereunder.

Done in open Court this 30th day of April, 1945."

Thereafter, on April 30, 1945, Desmond's paid to the executors of the Estate of Ralph R. Huesman, deceased, the sum of \$80,517.00 as compensation or bonus for services rendered by decedent to said corporation up to the date of his death, and on the same day the executors paid to the Testamentary Trustees of the trust aforesaid, said sum of \$80,517.00 pursuant to the above Order of Partial Distribution. Later the same day, the Trustees paid to Loyola University of Los Angeles, Regents' Fund, the sum of \$80,517.00 pursuant to the Court's order instructing them. At the time of the receipt of said sum of \$80,517.00 by the Testamentary Trustees and at the time of distribution thereof by them as aforesaid, said sum constituted the only cash asset of the trust estate. The only other then existing asset of the trust estate was its right to receive the trust corpus from the decedent's estate. [R. 36.]

Thereafter and within the time provided by law the appellants filed with the Collector of Internal Revenue for the Sixth District of California a fiduciary income tax return on Treasury Department Form 1041 for the Estate of Ralph R. Huesman, Deceased. Said return included within gross income the item "bonus from Desmond's \$80,517.00" and among others took a deduction of \$80,517.00 as "amount distributable to beneficiaries." [R. 107.] At all times herein material appellants kept their books and filed their Federal Income tax returns on a cash receipts and disbursements basis. [R. 36.]

Within the time allowed by law for filing thereof the testamentary trustees under the Will of the said Ralph R. Huesman, Deceased, filed with the Collector of Internal Revenue for the Sixth Collection District of California a fiduciary income tax return on Treasury Department Form 1041 for the fiscal year ended April 30, 1945. Said return showed a gross income of \$80,517.00 and deductions for distributions for "amounts distributable to beneficiaries" of \$80,517.00. [Stip., Ex. J, R. 121.]

On August 3, 1948, the Commissioner of Internal Revenue notified appellants of his determination that for the fiscal year ended April, 1945, there was a deficiency of Federal income tax amounting to \$57,923.50. The letter stated that the basis for the deficiency was that \$80,517.00 claimed as a deduction for amounts distributable to beneficiaries was disallowed as not constituting a proper deduction under the provisions of Section 162 of Internal Revenue Code. [R. 31.]

On September 2, 1948, appellants filed with The Tax Court of the United States their petition appealing from the Commissioner's determination. Thereafter on motion duly made and granted, appellants filed an amended petition with said Court alleging in addition to those things alleged in the original petition that appellants had prior to the filing of said amended petition paid to the Collector of Internal Revenue for the Sixth Collection District of California the deficiency determined by the Commissioner as aforesaid, together with interest thereon computed to the date of payment. [R. 14.] After a hearing before that Court it entered its decision in favor of the Commissioner on March 30, 1951. [R. 140.]

Specification of Errors.

1. The Court erred in holding as a matter of law that appellants were not entitled in the computation of taxable net income for the taxable year 1945, to deduct from gross income under Section 162 of the Internal Revenue Code, the sum of \$80,517.00 distributed by them to the Testamentary Trustees during the fiscal year ended April 30, 1945.

2. The Court erred as a matter of law in concluding that the sum of \$80,517.00 owed Ralph R. Huesman at the time of his death as bonus and paid by Desmond's to the executors of his estate was within the meaning of Section 126 of the Internal Revenue Code an item of gross income but was not an item of gross income within the meaning of Section 162(a).

3. The Court erred as a matter of law in concluding that the Will of Ralph R. Huesman, deceased, did not authorize the executors of his estate to distribute the sum of \$80,517.00 as income, said sum constituting a bonus due him at the time of his death for services rendered to Desmond's paid to the executors of his estate and distributed by them during the fiscal year ended April 30, 1945.

4. The Court erred in holding that for the fiscal year ended April 30, 1945, the Estate of Ralph R. Huesman, deceased, was liable for Federal income tax in the amount of \$57,923.50 on account of the inclusion within its taxable net income of the sum of \$80,517.00 bonus received and distributed by the executors during said year, whereas if any entity was taxable on account of said item, it was the Testamentary Trust under the Will of the said Ralph R. Huesman.

5. The Court erred in failing to find that during the fiscal year ended April 30, 1945, the executors of the Estate of Ralph R. Huesman, deceased, paid or permanently set aside the sum of \$80,517.00 of gross income of the estate pursuant to the terms of decedent's Will to be used exclusively for religious, charitable, scientific, literary and educational purposes.

6. The Court erred in deciding that for the fiscal year ended April 30, 1945, the Estate of Ralph R. Huesman, deceased, was liable for a deficiency of Federal income tax amounting to \$57,923.50, or any other sum.

7. The Court erred in failing to find that appellants made an overpayment of Federal Income Tax for the taxable year 1950 in the amount of \$71,459.35.

Summary of Argument.

The Tax Court's decision is erroneous in its determination that the term "gross income" as employed in Section 126 of the Internal Revenue Code properly includes the \$80,517.00 bonus due Mr. Huesman at the time of his death, but that the term "gross income" employed in Section 162(a) of the Internal Revenue Code does not include said item.

ARGUMENT.

I.

Appellants Are Entitled to a Deduction of \$80,517.00 for the Taxable Year 1945 Pursuant to Section 162(a) of the Internal Revenue Code on Account of the Distribution of That Amount Out of Gross Income of the Estate.

The bonus of \$80,517.00 owed to Ralph Huesman at the time of his death was an *income* item as the term is employed in the Internal Revenue Code, Sec. 22 I. R. C., IT 3857, 1947 C. B. 54. But since the decedent kept his books and filed his returns on a cash receipts and disbursements basis [R. 38] said item was not taxable to him on his final return but was properly included in the income reported by the executors of his estate pursuant to Section 126(a)(1)(A) which provides in applicable part as follows:

“SEC. 126. INCOME IN RESPECT OF DECEDENTS.

(a) Inclusive in Gross Income.—

(1) General Rule.—The amount of all items of gross income in respect of a decedent which are not properly includible in respect to the taxable period in which falls the date of his death or a prior period shall be included in the gross income, for the taxable year when received, of:

(A) the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;”

It was therefore an item of “*gross income*” within the meaning of Code when received by the executors. The

right to said *income* item was, however, a part of the *corpus* of the testator's *probate estate* and was properly included in said estate for *Federal Estate Tax purposes*. We emphasize this nomenclature because the proper understanding of the terms is essential to a correct decision in this case and we feel that it was partially attributable to a confusion of terms that The Tax Court arrived at an erroneous decision. We submit that *Boston Safe Deposit & Trust Co. v. United States* (U. S. D. C. Mass., 1948), 75 Fed. Supp. 884, properly analyzes and exposes the fallacies in the government's argument advanced in this case. In *Boston Safe Deposit & Trust Co. v. United States, supra*, the decedent was a member of three insurance partnerships. Pursuant to agreement the executors elected to continue the decedent's partnership participation after his death and during the years 1940 and 1941 they received and duly distributed funds arising therefrom. Having paid the tax on said income they filed claims for refund, alleging that on account of the distributions made by the estate to testamentary trustees under a residuary clause in the decedent's will they were entitled to deductions therefor under Section 162(c). Suit was instituted on the claims and the government there, as in this case, contended that the distributions were of corpus or residue of the estate and hence not deductible. The Court held in favor of the executors, saying that while it was true the amounts received arose out of the right to partnership profits constituting a part of the corpus of the Probate Estate, yet nevertheless when received said profits constituted taxable income within the meaning of Section 162(c), I. R. C. Because we wish to quote from the Court's opinion in the foregoing case at some length, we have quoted that case in the appendix hereto at page 1.

We believe that the Court there properly analyzed and defined the basic precepts that should control the determination in this case.

(a) *The Tax Court's Decision*—"Gross Income": As far as the text of the lower court's opinion is concerned it does not undertake to grapple with the language of the statute but only reviews indecisive Congressional Reports and concludes with a decision in favor of respondent. [R. 127-139.] However, the headnote of the Court's decision written and approved by the Court (16 T. C. 656) does meet the issue head-on. It states:

"Petitioners, during the taxable year, received cash constituting the payment of a bonus owing decedent at the time of his death. Under court order they immediately paid this cash over to trustees who in turn paid it to a beneficiary under the trust as a partial satisfaction of its legacy. The money was included in decedent's estate income tax return under section 126 of the Internal Revenue Code, and then deducted under section 162 of the Code. *Held*, section 126 is a remedial provision enacted for the benefit of a decedent in connection with his final income tax return, and relates to income earned by a decedent but not as yet received at the time of his death; while section 162 refers to income earned by an estate during its administration, and does not apply to items which are income merely because of section 126. Therefore, the deduction, under section 162, was incorrect."

Appellants submit that whatever may be its basis the decision of The Tax Court is erroneous. If the decision is predicated upon Congressional Reports we submit that such reports are irrelevant because they do not consider the problem presented here and for that reason are wholly

indecisive. On the other hand, if the decision is predicated upon the proposition stated above in the headnote then we submit that the decision is clearly erroneous as a matter of law.

Section 162(a) of the Internal Revenue Code provides as follows:

“SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(a) there shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) *any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;”* (Emphasis supplied.)

In its introductory clause the above section states that there shall be allowed as a deduction “*any part of the gross income*” which is distributed as therein specified. Unquestionably the \$80,517.00 distributed by the estate was an item of “*gross income.*” (Sec. 126, I. R. C.; *Boston Safe Deposit & Trust Co. v. United States, supra.*) So far The Tax Court agrees. But, says The Tax Court, the term “*gross income*” as employed in Section 126 is

not the same as the term “*gross income*” used in Section 162(a). At that point appellants part company with The Tax Court for as the Supreme Court has said, “In the absence of express restriction it may be assumed that a term is used throughout a statute in the same sense in which it is first defined” (*Pampanga Sugar Mills v. Wenceslao Trinidad*, 279 U. S. 211, 218, 49 S. Ct. 308, 73 L. Ed. 665, 668), and “*should receive no stricter interpretation in the exemption because used to define an exemption.*” (*Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 150, 64 S. Ct. 474, 88 L. Ed. 635, 640. Italics supplied.)

Neither the appellee nor The Tax Court questions the propriety of appellant’s including the \$80,517.00 in reportable “gross income.” If the item was “gross income” for that purpose then appellants submit it was “gross income” for the purpose of Section 162(a).

(b) *The distribution of the \$80,517.00 item otherwise qualified under Section 162(a) as a deduction:*

Section 162(a) goes on to provide that there shall be allowed as a deduction any part of the gross income “which pursuant to the terms of the will . . . is during the taxable year paid or permanently set aside for the purposes and in the manner specified in Section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes . . .” Upon petition by the executors the Superior Court exercising probate jurisdiction directed that “upon receiving said certain sum of \$80,517.00 from Desmond’s a corporation, specifically as compensation due to the decedent in the form of a bonus at the time of his death, [the executors] shall deliver said specific sum to the testamentary trustees” [R.

106] and the Court further directed the trustees to make delivery thereof “as a specific sum to Loyola University of Los Angeles Regents’ Fund.” [R. 106.] Payment was accordingly made as directed. [R. 107.] Clearly therefore this item of gross income was permanently set aside and paid pursuant to the terms of the will and the Court’s order interpreting the will for the educational purposes specified in Section 162(a). [R. 33.]

In this regard we call attention to the fact that the Superior Court’s construction of the will and its orders (which it is stipulated were in no sense collusive [R. 34]) are for the purposes here in issue binding upon this Court. (*Uterhart v. U. S.*, 240 U. S. 598, 36 S. Ct. 416, 60 L. Ed. 819; *Roberts v. Lewis*, 153 U. S. 367, 14 S. Ct. 945, 38 L. Ed. 747; *Daly’s Lessee v. James*, 8 Wh. 495, 5 L. Ed. 670.)

Insofar as Section 162(a) is concerned therefore *Old Colony Trust Company v. Commissioner*, 301 U. S. 379, 57 S. Ct. 813, 81 L. Ed. 1169, is controlling. In that case an *inter vivos* trust having life annuitants, remainder to charities, *authorized* the trustees to make discretionary payments to charities whenever this could be done without jeopardizing the annuities and, after the death of the survivor annuitant, *directed* the trustees to distribute the residue among charities. During 1931, the trust had net income of some \$164,000, paid \$22,350 to annuitants and \$190,000 to charities. The trust claimed a deduction under Section 162(a) which the Commissioner and the First

Circuit disallowed on the theory that, since the trustees were merely *authorized* and not *required* to make the \$190,000 payment to charities, the payment was not *pursuant* to the will. The Supreme Court reversed, stating (p. 382):

“Under Section 162 . . . is it necessary that the will or deed creating a trust definitely direct the charitable contributions which are claimed as deductions?

* * * * *

“We are asked to hold that the words ‘pursuant to’ mean directed or definitely enjoined. And this notwithstanding the admission that Congress intended to encourage charitable contributions by relieving them from taxation . . .

“‘Pursuant to’ is defined as ‘acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according.’

“The words of the statute are plain and should be accorded their usual significance in the absence of some dominant reason to the contrary. . . .

“The questioned donations were made by the petitioners in pursuance of the trust deed.”

In this connection it should be noted that the distribution in the case at bar was ordered under the *residuary* legacy of the will which authorized the distribution of principal or income in satisfaction of the legacy. Hence the Court could properly, as it saw fit to do, direct that this item of “gross (taxable) income” be applied in par-

tial satisfaction of the legacy. (*Commissioner v. Crawford* (C. C. A. 3rd, 1943), 139 F. 2d 616; *Boston Safe Deposit & Trust Company v. U. S.* (U. S. D. C. Mass.), 75 Fed. Supp. 884; *Estate of Ida White*, 41 B. T. A. 525; *Estate of Robert Harwood*, 3 T. C. 1104.

Accordingly appellants submit that the bonus item in question was with respect to decedent's estate an item of "gross income" which was, within the meaning of the statute, "pursuant to the terms of the will" paid to a charitable institution and is therefore deductible.

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APPENDIX.

In *Boston Safe Deposit & Trust Co. v. United States* (U. S. D. C. Mass., 1948), 75 Fed. Supp. 884, in holding that the executors of a decedent's estate were entitled to deductions under Section 162(c), I. R. C., for profits arising from a partnership interest held by the estate the court said in applicable part:

“(1) The right to share in the partnership profits was an asset of the testator's estate and was a part of the corpus of the estate. However, the amounts actually received from the partnership as a share of the profits was income to the estate. *Bull v. United States*, 295 U. S. 247, 55 S. Ct. 695, 79 L. Ed. 1421.

“Counsel for the government contend that the partnership profits were paid over to the trustees and distributed to the beneficiaries as a part of the corpus of the estate, and not as income. They point out that in the accounts of the executors and trustees which were approved and allowed by the Probate Court, these sums were referred to as principal and not as income. They, therefore, assert that since the state court has approved and allowed the payments as ‘out of principal,’ the plaintiffs cannot now assert that they were income, since this court is conclusively bound to follow the determination by the state court.

“(2) It is true that a federal court must apply state law in determining what persons are qualified to inherit property within that jurisdiction, the right

of a person to make a testamentary disposition of property, the conditions essential to the validity of wills or the construction of wills. Also the state establishes the procedure governing the probate of wills and the processes of administration. *Cf.* *Lyeth v. Hoey*, 305 U. S. 188, 193, 59 S. Ct. 155, 158, 83 L. Ed. 119, 119 A. L. R. 410. But 'In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls * * *.' *Lyeth v. Hoey, supra*.

"(3) Thus, in determining whether specific sum of money is a part of the net income of an estate or is a part of the residuary corpus, this court is bound by neither the classification made by the executor, nor the fact that the executor's classification is approved by the state court. *Cf.* *Osburn California Corporation v. Welch, Collector of Internal Revenue*, 9 Cir., 39 F. 2d 41. In the instant case, it is immaterial that the accounts of the executors-trustees, approved by the Probate Court, referred to the payments in question as payments out of principal. The important question here is whether they constituted payments out of income within the meaning of Sec. 162(c), 26 U. S. C. A. Int. Rev. Code.

"(4) In my opinion, the right to share in the partnership profits was a chose in action which was a part of the residue of the testator's estate. However,

the actual payments by the partnership to the executors of the share of the annual profits of the partnership constituted income to the estate. Thus, when the executors paid over these sums to themselves as trustees, or in effect to the beneficiaries, they were paying over income and not principal. It was income derived from the chose in action which was a part of the residue. As such, it was deductible from the income of the estate for income tax purposes, in accordance with Sec. 162(c) of the Internal Revenue Code, 26 U. S. C. A. Int. Rev. Code, §162(c)."

